FILED
JAN 6 1998
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No. 97-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STAR ENTERPRISE,

Petitioner,

vs.

MATTHEWS SMITH ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. *The Appeal of the Preliminary Injunction is not Moot*

Several times in their opposition brief, Respondents suggest that Star's arguments as to the preliminary injunction are not cognizable because the preliminary injunction was allegedly dissolved by the district court. Brief in Opposition, at 5, 11 n.7, 15. However, in its order to "dissolve" the injunction, the district court stated only that:

> To the extent this court may have jurisdiction of this action while the appeal pends, the preliminary injunction is now DISSOLVED and SET ASIDE.
>
> In the more likely event that this court does not retain jurisdiction while the preliminary injunction is on appeal, the court will forward the plaintiff's motion and this order to the Court of Appeals for the Fifth Circuit for such action as it deems appropriate.
>
> *This court is of the opinion such motion for dissolution should be filed with the Court of Appeals for the Fifth Circuit.*

(emphasis added) (Attached at App.-1). Respondents never filed a motion for dissolution with the Fifth Circuit, nor is there any indication in the record that the Fifth Circuit considered the dissolution of the preliminary injunction in affirming the lower court's decision. Indeed, the district court was correct in assuming that it was without jurisdiction to dissolve the preliminary injunction during the pendency of the appeal of the injunction before the Fifth Circuit. "The filing of a notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the

appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Thus, because the district court's dissolution was invalid and the Fifth Circuit failed to address the issue, the status of the preliminary injunction is in question and the injunction may remain in effect.

Even if the district court's dissolution of the preliminary injunction was effective, such dissolution would not moot an appeal of the injunction because Star is entitled to the amount of the bond posted by plaintiff if this Court determines that Star was wrongfully enjoined. *See Continuum Co., Inc. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989) (stating that bond ensures enjoined party that it may obtain damages, even if movant is insolvent, as long as court determines it was wrongfully enjoined). Thus, questions as to the overbroad and burdensome nature of the preliminary injunction are properly before this Court.

II. *Star's Argument that the Terms of the Preliminary Injunction and the "Document Preservation Order" Constitute an Unconstitutional Prior Restraint on Star's Right of Free Speech Have Not Been Waived*

Respondents claim that Star's First Amendment argument is waived because such argument was not raised until Star's Petition for Panel Rehearing to the Fifth Circuit. Brief of Opposition, at 5. Star has not waived the argument because it made overbreadth arguments as to the preliminary injunction and the document preservation order consistently throughout its briefing in the district and appellate courts. The First Amendment issue is a variation on the overbreadth arguments and the record shows that the substantive concept of overbreadth has been properly presented to this Court. *See Patin v. Allied Signal, Inc.*, 77 F.3d 782, 786 (5th Cir. 1996)

(stating that appellants did not waive complaint in removal proceeding because the "substantive concept" was averted to in both the motions and the hearing).

Further, courts will consider arguments even if belatedly raised when consideration of the issue is necessary to avoid manifest injustice *or* the issue is purely legal. *See Duamutef v. O'Keefe*, 98 F.3d 22, 25 (2d Cir. 1996); *Animal Protection Inst. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988). Star's First Amendment overbreadth argument is purely a legal question for this Court to decide. Further, failure to consider this important issue would result in manifest injustice. The First Amendment embodies some of the most precious rights we have as citizens of the United States. As Justice Hugo Black once stated:

> I view the guarantees of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.

Drivers v. Meadowmore Dairies, 312 U.S. 287, 301-02 (1942) (Black, J., dissenting).

Star has demonstrated that the effects of the preliminary injunction and the document preservation order will have farreaching effects on the free speech rights of Star Enterprise

and its employees as well as other employees who may be subject to similar injunctive orders. Thus, failure to consider Star's First Amendment argument would result in manifest injustice. *See Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 708 n.1 (3d Cir. 1978) (finding that first amendment issue not raised in district court would be considered on appeal because of great public interest).

CONCLUSION

For the foregoing reasons, Star's petition for a writ of certiorari should be granted.

Dated: December 29, 1997
Houston, Texas

Respectfully submitted,

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APPENDIX

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED-CLERK
U.S. DISTRICT COURT

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TX EASTERN-BEAUMONT

BY /s/ Angela Bella

MATTHEWS SMITH, ET AL	§	
V.	§	NO. 1:96-CV-0749
TEXACO INC., AND STAR ENTERPRISE	§	

ORDER

On January 2, 1997, this court granted a preliminary injunction sought by the plaintiffs, restraining and enjoining the defendants from destroying, deleting, altering, or making certain records unavailable to plaintiff, Matthews Smith, an African American employee of Star Enterprise and Texaco Inc., who purports to represent, as class representative, numerous other African American employees of the defendants, allegedly discriminated against by defendants on a racial basis. On January 7, 1997, the order granting the preliminary injunction was appealed to the Court of Appeals for the Fifth Circuit, and on February 14, 1997, that court, upon motion of the defendants, stayed the preliminary injunction until it could hear the appeal upon an expedited basis.

On February 4, 1997, the plaintiffs, with leave of court, filed an amended complaint, adding Karen Love, Darlene Greene, Kenneth Ford, John Lumpkins, and John Comeaux as individual plaintiffs, and seeking class certification under Rule 23, FED. R. CIV. P. for alleged violations of 42 U.S.C.

§ 1981, and 42 U.S.C. § 2000(e) for alleged racial discrimination.

The Court of Appeals for the Fifth Circuit, in the written order, stated the stay was granted, "without prejudice to any discovery order that may be sought during the now-filed lawsuit."

Three Document Preservatrion Orders have now been entered, and the plaintiffs seek to dissolve the January 2, 1997, preliminary injunction. To the extent this court may have jurisdiction of this action while the appeal pends, the preliminary injunction is now DISSOLVED and SET ASIDE.

In the more likely event that this court does not retain jurisdiction while the preliminary injunction is on appeal, the court will forward the plaintiff's motion and this order to the Court of Appeals for the Fifth Circuit for such action as it deems appropriate.

This court is of the opinion such motion for dissolution should be filed with the Court of Appeals for the Fifth Circuit.

SIGNED this 21st day of March, 1997.

/s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE